IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-414

UNITED AIR LINES, INC.,

Petitioner,

vs.

STATE HUMAN RIGHTS APPEAL BOARD AND STATE DIVISION OF HUMAN RIGHTS ON THE COMPLAINTS OF LINDA MORTIMER AND MIROSLAWA ROSENFELD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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Petitioner, United Air Lines, Inc. (hereinafter "United") respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered June 13, 1978 in Case Mo. No. 490 *United Air Lines, Inc.* v. *State Human Rights Appeal Board and State Division of Human Rights on the Complaints of Linda Mortimer and Miroslawa Rosenfeld.*

OPINIONS BELOW.

This case arose as a result of two separate complaints filed with the New York Division of Human Rights (the "Division") by two flight attendant employees of United named Miroslawa Rosenfeld and Linda Mortimer. The decision of the New York

Division in the case of Ms. Rosenfeld, dated September 10, 1975, is unreported; a copy is appended hereto at Appendix, A-1. The Division's decision in the case of Ms. Mortimer, dated May 28, 1976, is also unreported; a copy is appended hereto at Appendix A-9. Both decisions were appealed by United to the New York State Human Rights Appeal Board (the "Appeal Board"). The Appeal Board affirmed the decision in the case of Ms. Rosenfeld on April 22, 1977, and affirmed the decision in the case of Ms. Mortimer on July 6, 1977. The Board's decisions, which are unreported, are appended thereto at Appendix A-21 and A-23.

United appealed the two appeal board decisions to the New York Supreme Court, Appellate Division. The two cases were consolidated for purposes of argument and ruling. On March 13, 1978, the Appellate Division issued an order affirming the decisions of the Division and Appeal Board. A copy of the Appellate Division's decision, 61 AD 2d 1010, is appended hereto at Appendix, A-25. United thereupon moved the Court of Appeals of the State of New York for leave to appeal the decision of the Appellate Division. United's motion was denied on June 13, 1978. A copy of the denial, 44 N. Y. 2d 648, is appended hereto at Appendix, A-29.

JURISDICTION.

The final decision of the New York Court of Appeals was entered on June 13, 1978. The federal question was raised as indicated at pp. 7-9, *infra*. Jurisdiction is conferred on this Court by 29 U. S. C. Section 1257(3).

QUESTION PRESENTED FOR REVIEW.

Is a state agency's decision ordering an interstate air carrier to abrogate its long established policy of placing flight attendants on maternity leave during pregnancy, which policy has

been affirmed in the federal courts as being a proper implementation of the duty of an air carrier under federal law to perform its operations with the highest degree of safety in the public interest, invalid under the Commerce and Supremacy Clauses of the United States Constitution?

STATUTES INVOLVED.

United States Constitution, Art. I, Sec. 8, Cl. 3 which reads:

> "[Congress shall have power] to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."

United States Constitution, Article VI, Clause 2, which reads:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE.

United is an interstate common carrier by air whose operations are subject to the Federal Aviation Act of 1958, 72 Stat. 737, as amended, 49 U. S. C. 1301 *et seq.* United operates approximately 1,500 flights daily to various airports serving over 100 cities in thirty-three states and Canada. One of the states served is the State of New York. United also employs approximately 50,000 persons, male and female, including approximately 7,000 flight attendants, also known as stewards and stewardesses.

United, in common with most other U. S. certificated air carriers, has long had a policy, based on medical-safety reasons, which requires stewardesses to cease flying upon knowledge of pregnancy. The specific policy involved in this case appears in

the collective bargaining agreement between United and its flight attendants previously represented by the Air Line Pilots Association and currently represented by the Association of Flight Attendants, as follows:

> "A stewardess shall, upon knowledge of pregnancy, discontinue flying. Upon request, the Company shall grant such stewardess a maternity leave of absence. Such stewardess must be available to return to active service as a stewardess within ninety (90) days following date of delivery unless additional time is deemed necessary by the Company's medical examiner. In no case shall such period to return exceed six (6) months. Return to active service is contingent on passing a Company physical examination. Such stewardess shall retain and continue to accrue seniority during the leave of absence; however, she shall not accrue vacation or sick leave during the period of the leave and she shall not be eligible for sick leave benefits for time lost for pregnancy. * * *"

The policy quoted above applies only to stewardesses and not to any other female employees of United. Other female employees are permitted to continue working during their pregnancies as long as they wish.

In 1974, two United stewardesses, Karen Condit and Mary E. Oravec, filed a class action lawsuit in the U. S. District Court for the Eastern District of Virginia alleging, among other things, that United violated the sex discrimination prohibitions of Title VII of the Civil Rights Act of 1964, 42 U. S. C. 2000e *et seq.*, as amended, in requiring that they be placed on maternity leaves because of their pregnancy. *Karen Condit and Mary E. Oravec* v. *United Air Lines, Inc.*, 13 FEP Cases 689 (E. D. Va. 1976).

In October and November, 1975, a trial in the *Condit* case took place in the District Court at which time the parties were given opportunity to introduce evidence and testimony as to the nature of and need for the stewardess maternity policy. United's position before the Court was that "sex discrimination" was not involved since the policy did not apply to all female employees of the company, but only to stewardesses because of

their unique in-flight safety responsibilities and, further, that the policy was justified as a "bona fide occupational qualification" under Section 703(e) of Title VII because of the potential for incapacitation associated with pregnancy and United's duty under federal law to operate with the highest degree of care in the interest of passenger safety.

On September 3, 1976, the District Court in *Condit* issued a Memorandum Opinion and Order in which it reviewed the evidence and arguments and concluded that (13 FEP Cases at 692, 693):

> "United is a common carrier charged with exercising the highest degree of care for the safety of its passengers. Said another way, the FAA statute, 49 U.S.C. § 1421(b), requires airlines to perform their services with the highest possible degree of safety in the public interest.
>
> In short, the law imposes on United the obligation of taking no chances when it comes to safety.
>
> * * *
>
> United has clearly shown by the record here made that its mandatory maternity leave policy has a manifest relationship to the continuing employment of stewardesses during their pregnancy.
>
> The safety of passengers must come first—in cases of doubt, that doubt must be resolved in favor of the passengers—Airlines must take no chances when it comes to safety.
>
> Taking into account the total pregnancy picture as here shown, United is justified in enforcing its mandatory maternity leave policy as a bona fide occupational qualification for the continued employment of stewardesses during their pregnancy."

A copy of the *Condit* decision by the District Court is included in the Appendix hereto at pages A-30 to A-41.

The plaintiffs in *Condit* appealed the District Court's decision to the U. S. Court of Appeals for the Fourth Circuit. On July 28, 1977, in a *per curiam* decision, *Karen Condit and Mary E. Oravec* v. *United Air Lines, Inc.*, 558 F. 2d 1176 (4th Cir.

1977), the Fourth Circuit affirmed the District Court's decision stating, in part, that (558 F. 2d at 1176):

> "The district court found, on conflicting expert testimony, that pregnancy could incapacitate a stewardess in ways that might threaten the safe operation of aircraft. It therefore concluded that United's policy of refusing to allow stewardesses to fly from the time they learned they were pregnant was consistent with a common carrier's duty to exercise the highest degree of care for the safety of its passengers. (Footnote omitted.)

A copy of the Fourth Circuit's decision is included in the Appendix hereto at page A-42.

On January 27, 1978, Condit and Oravec, on behalf of themselves and the class, petitioned for a Writ of Certiorari to this Court. On March 20, 1978, this Court denied the petition, letting stand the decisions of the District Court and Fourth Circuit in Condit. ..... U. S. ....., 98 S. Ct. 1510 (1978); Appendix, A-44.

Before the *Condit* case was decided by the District Court, another United Stewardess, Miroslawa Rosenfeld, who was based at the stewardess domicile at New York, filed a complaint with the New York Division of Human Rights on March 22, 1974 alleging that United violated the New York Human Rights Law (Executive Law § 290 *et seq.*) when it placed her on maternity leave. Another stewardess, Linda Mortimer, filed a similar complaint with the Division on September 4, 1974. Both cases proceeded to an administrative hearing before the Division's hearing examiners.

United's position before the Division was the same as in the *Condit* case; namely, that no sex discrimination was involved and that United's federal duty to perform its operations with the highest degree of safety in the public interest justified the policy that flight attendants be placed on maternity leave upon knowledge of pregnancy. The Complainant's position was also the same as that of the plaintiffs in *Condit; i.e.,* that the maternity

leave policy constituted sex discrimination since it applied to female flight attendants but not to males.

On September 10, 1975, in the case of Ms. Rosenfeld and on May 28, 1976, in the case of Ms. Mortimer, the Division issued separate, but largely identical, orders upholding the complaint of each stewardess. The Division's Orders, *inter alia,* required United to permit stewardesses to fly while pregnant for up to twenty weeks based upon certifications from their personal physicians that they could perform their duties without risk to health or safety and, further, that they could fly an additional eight weeks if United's doctors concurred. The Order permitted United to place pregnant stewardesses on maternity leave during and after the twenty-eighth week of pregnancy without regard to their physical conditions. The Order also required United to make, *inter alia,* certain payments to the Complainants.

United appealed the Division's Orders to the State Human Rights Appeal Board. While the appeals were pending and after briefs were filed, the *Condit* decision was issued on September 3, 1976. United brought the *Condit* decision to the attention of the Appeal Board inasmuch as that decision affirmed United's position that its maternity leave policy was justified for safety reasons in compliance with the Federal Aviation Act and was a bona fide occupational qualification for stewardesses. United pointed out also that the airline is an integrated operation with stewardesses flying into and out of many states, and United could not apply a different, less safe, standard of safety to its operations in New York than to the rest of its system. The Appeal Board, however, summarily affirmed the Orders of the Division without comment.

In accordance with New York law, United appealed the decisions of the Division and Appeal Board to the New York Supreme Court, Appellate Division. It expressed in its brief to the Appellate Division, among other points, the federal question that:

> "Since federal law imposes upon United the obligation to operate with the highest degree of safety and that obliga-

tion has been judicially construed to mean that stewardesses must discontinue flying upon knowledge of pregnancy, a contrary determination by a state agency must give way to federal law." (United's brief to the New York Supreme Court, Appellate Division, dated August 18, 1977, p. 26.)

United also raised the federal question concerning the effect of the New York decision as a burden on interstate commerce by stating in its brief (p. 37) that:

> "To allow New York State, through the Division's Order, to impose its requirements on the policy so as to alter that policy would allow other states to so regulate the same policy, leading to the possibility of conflicting State regulation. The potential for conflicting State regulation creates an intolerable burden on commerce and is, therefore, unconstitutional under the U. S. Constitution, Art. I, § 8, cl. 3."

The Appellate Division, as in the case of the Appeal Board's decisions, affirmed the Orders of the Division and Appeal Board without opinion.

Subsequently, on May 2, 1978, in accordance with New York law, United filed with the Court of Appeals of the State of New York a notice of motion for leave to appeal and brief in support of motion for leave to appeal. The Notice stated in relevant part (p. 2 of Motion):

> "The grounds upon which such leave are asked are set forth in detail in the attached brief which is hereby made a part hereof, and, concisely stated, are as follows:
>
> 1. That such appeal is required in the interests of substantial justice.
> 2. That questions of law are raised herein which are questions of vital public importance, to-wit: Whether, when there is a federal court decision, upheld by the U. S. Supreme Court's denial of certiorari, affirming the right of an interstate air carrier to place flight attendants on maternity leave upon knowledge of pregnancy because of that air carrier's federally mandated duty to operate with the highest degree of safety in the public interest, a state agency's contrary decision may stand.
> 3. That questions of law are involved which are of substantial importance to interstate air carriers with similar policies throughout the nation. * * *"

In its brief accompanying its motion for leave to appeal as filed with the Court of Appeals, United continued its position that the federal question was involved by stating in part (Brief, p. 12):

> "United's maternity leave policy, as set forth in the collective bargaining agreement covering all United's flight attendants is uniformly applied to all stewardesses throughout United's system. * * * It cannot be varied on a state by state basis without imposing an undue burden on interstate commerce. . . ."

The brief also elaborated on the Supremacy Clause question by stating in part (Brief, pp. 13-14):

> "Where a state or local action produces a result inconsistent with a federal ruling under a relevant federal statute, the local action must fall. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1946). Federal action will, under the Supremacy Clause, invalidate local action where there is 'such actual conflict between the two schemes of regulation that both cannot stand in the same area. . . .'."

The Court of Appeals on June 13, 1978 denied the motion for leave to appeal without opinion.

REASONS THE WRIT SHOULD BE GRANTED.

In this case a state court has decided questions of substance in a way probably not in accord with applicable decisions of this Court; namely, that a state agency's order may stand although it is in direct conflict with the duty of an interstate air carrier, under federal law and as interpreted by a federal court, to operate with the highest degree of safety in the public interest.

Further, the state court has allowed decisions of the state agency to stand despite the fact that such decisions, if implemented, would cause an undue burden on commerce by intruding into an area in which uniformity of operation on a nationwide basis is essential.

The responsibility of United and other interstate air carriers for safety is set forth in the Federal Aviation Act of 1958, 49 U. S. C. § 1301 *et seq.* That Act, in Section 601(b) (49 U. S. C. § 1421(b)) provides that air carriers have the duty "to perform their services with the highest possible degree of safety in the public interest."

In implementing that duty, United and virtually all other carriers have long had a policy of requiring flight attendants to discontinue flying upon knowledge of pregnancy.

When the New York Division of Human Rights, in the case at hand, was adjudicating the rights of stewardesses Rosenfeld and Mortimer in connection with their claims that United's policy violated the Human Rights Law in New York, it was United's defense that such policy was justified as a bona fide occupational qualification inasmuch as the policy was in fulfillment of United's federal duty to perform its operations with the highest degree of safety.

United's defense having thus been raised, it became necessary for the Division of Human Rights to make a determination as to whether United's policy constituted a valid implementation of its federal safety duty. At the time it was making this determination, the *Condit* decision had not yet been rendered and the Division did not have the guidance of the federal court's decision in *Condit* on which to base a ruling. The Division ruled that United's policy did not constitute a bona fide occupational qualification and that the policy constituted sex discrimination within the meaning of the New York Human Rights Law.

Subsequent to the time the Division rendered its ruling in the *Rosenfeld* and *Mortimer* cases, the U. S. District Court entered

its decision on September 3, 1976, in the *Condit* case. The *Condit* decision constituted the federal court's interpretation of the same policy considered by the Division in the *Rosenfeld* and *Mortimer* cases and it also determined, as did the Division earlier, the question of whether that policy was a valid implementation of the carrier's duty under the Federal Aviation Act to perform its operations with the highest degree of safety in the public interest. The court in *Condit* interpreted the policy as being justified as a result of United's federal safety responsibility.

The *Condit* decision is in direct conflict with the *Rosenfeld* and *Mortimer* decisions of the Division. Whereas, in the *Rosenfeld* and *Mortimer* decisions, the Division ruled that United's safety responsibility under federal law did not justify its policy, the federal court in *Condit* ruled that the policy was justified.

It is evident under the Supremacy Clause of the United States Constitution that the federal interpretation of the safety responsibilities of United under the federal law must prevail over a contrary state determination.

As recently stated by this Court in *Jones* v. *Rath Packing Co.*, ... U. S. ....., 97 S. Ct. 1305, 1309 (1977):

> "Congressional enactments that do not exclude all state legislation nevertheless override state laws with which they conflict. U. S. Const. Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is 'to determine whether under the circumstances of this particular case, (the state's) law stands as an obstacle to the accomplishment and execution of the full powers and objectives of Congress.' (citations omitted). This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written (citations omitted), * * *"

And, as this Court stated in its earlier decision in *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 236 (1946):

> "The test, therefore, is whether the matter on which the state asserts the right to act is in any way regulated by the

> Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State. By that test each of the nine matters we have listed is beyond the reach of the Illinois Commission since on each one Congress has declared its policy in the Warehouse Act. The provisions of Illinois law on those subjects must therefore give way by virtue of the Supremacy Clause. U. S. Const., Art. VI, Cl. 2."

In the case at hand, it is unmistakably clear that Congress has enacted a federal scheme, embodied in the Federal Aviation Act, regulating the safety of interstate air transportation. It is also unmistakably clear that that Act sets forth in explicit terms the duty on interstate common carriers by air to perform their operations with the "highest possible degree of safety in the public interest." In fulfillment of that duty, United has adopted its policy that stewardesses, because of the risk of incapacitation, must discontinue flying while pregnant. The federal courts in *Condit* have ruled that such policy is justified as a proper exercise of its safety responsibilities pursuant to the federal Act. Under these circumstances, it is clear that a state order which purports to interfere with and abrogate United's right to carry out its safety responsibilities must fall.

United, as stated earlier in this Petition, is an interstate common carrier by air which operates approximately 1,500 flights daily to various airports serving over 100 cities in thirty-three states and Canada. The State of New York is but one of the states it serves. Flight attendants are based in many other states besides New York and are subject to flight assignments in any state in which the company operates. United's route system is essentially a network of interstate routes and its flight safety policies are uniform policies designed to maintain safety throughout its system.

As noted, the *Condit* decision has established that United's policy of requiring flight attendants to discontinue flying when pregnant is a valid, justifiable, safety policy under federal law. That policy, as with other safety policies, is applied on a system-

wide basis and is applicable to all flight attendants who become pregnant.

The Order of the New York Division, if allowed to stand, would lead to the situation in which a lesser standard of safety than that approved by the Court in *Condit* would be substituted for the present, systemwide standard, for if United is required as a result of the New York Order to allow New York flight attendants to fly when pregnant, there is no feasible way of allowing them to fly only in New York while pregnant. Flights departing from New York travel to numerous other cities in various states and do not stop at the borders of New York to change crews.

Thus, the New York Order, while purporting to cover New York, in practical effect reaches into many states and would pervade United's entire operation. Since other states and localities have the same right to interpret their laws as does New York, United could be subject to inconsistent local and state regulation of its flight operations as well as the inconsistent regulation now present between the New York law, as interpreted, and the federal law, as interpreted. United's flight operations are of a nature which require uniformity of operation, not changes from state to state.

As aptly stated in *United Air Lines, Inc.* v. *Industrial Welfare Commission*, 28 Cal. Rptr. 238 (Calif. Dist. Ct. of Appeal, 1963) by a California court in a case in which a California agency attempted to impose an obligation on United to pay for flight attendant uniforms despite a collectively bargained agreement between United and its flight attendants to the contrary:

> "Plaintiff [United] contends that the application of the [state agency's] regulation would impose an undue burden on interstate commerce. While as will hereinafter appear that burden may not be very great, nevertheless the subject is one which necessarily requires uniformity of treatment. Although the facts in the case are different from those here, the following language in *Southern Pacific Co.* v. *Arizona* (1944), 325 U.S. 761, 767, 65 S.Ct. 1515,

> 1519, 89 L.Ed. 1915, is applicable: '[T]he states have not been deemed to have authority * * * to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.' Another way of stating the principle appears in *Hall* v. *DeCuir* (1877), 95 U.S. 485, 489, 24 L.Ed. 547: 'Uniformity in the regulations by which he [the carrier] is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be.' * * * Congress has provided for uniformity in leaving the subject matter here to the free agreement of the employer and the employees."

See also *Pan American World Airways* v. *Division of Labor Law Enforcement,* 203 F. Supp. 324 at 325, 326 (N. D. Cal. 1962) wherein the court stated in rejecting an attempt by a state agency to invade a federally pre-empted area:

> "Even though the jurisdiction of defendant is limited to California employees the repercussions of the ruling will be national in scope and will have a profound influence on the ultimate disposition of the claims of the great majority of pilots who are employed outside of California.
>
> * * * * *
>
> If California intrudes itself in this dispute its disposition will give rise to a ruling which may lack uniformity on a national scale and preclude the integration which is deemed desirable in a problem of the sort raised by the issues now under consideration."

It is manifest that the New York Order in the case at hand, if left standing, will place a burden on United's interstate operations and have a "profound influence" on United's safety policies well beyond New York's borders. Accordingly, it is clear that the New York Order should be invalidated not only because it runs afoul of the Supremacy Clause of the U. S. Constitution, but also because it imposes an undue burden on interstate commerce in contravention of the Commerce Clause of the U. S. Constitution.

United wishes to make clear in this Petition that it is not attacking, nor attempting to invalidate, the New York State Human Rights Law. It is only attacking the interpretation of that Law as applied to the facts of the instant case. Obviously, the State has a right to legislate its own laws covering civil rights and has done so in this case. No state, however, may properly interpret its law in such a way as to invade a federally occupied area, as the *Rice* and *Jones* decisions of this Court, *supra,* make clear. It is on this basis only that United maintains the State Division's Order is invalid.

CONCLUSION.

For the foregoing reasons, United respectfully requests this Court to grant this Petition.

Respectfully submitted,

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Appendix

APPENDIX TO PETITION.

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS on the complaint of MIROSLAWA ROSENFELD,
Complainant,

—against—

UNITED AIRLINES, INC., J. F. KENNEDY INTERNATIONAL AIRPORT; JOHN L. HAMMADUE, MANAGER, STEWARDESS SERVICES; AND KAY O'BRIEN, SUPERVISOR, HANGAR 8,
Respondents.

Case No.
CS-32898-74

NOTICE OF ORDER AFTER HEARING.

Sirs:

Please Take Notice that the within is a true copy of an Order issued herein by Werner H. Kramarsky, Commissioner of the State Division of Human Rights, after a hearing held before Hearing Examiner George S. Sable, Esq. In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at 270 Broadway, New York, New York 10007. The Order may be inspected by any member of the public during the regular office hours of the Division.

Please Take Further Notice that in accordance with Section 297-a of the New York State Human Rights Law, any party to the proceeding aggrieved by said Order of the Division may

obtain review thereof in a proceeding before the State Human Rights Appeal Board, 2 World Trade Center, 82nd Floor, New York, New York 10047, provided such appeal is commenced by the filing with the Board of a notice of appeal within fifteen (15) days after the service of this Order.

Dated: September 10, 1975

New York, New York

STATE DIVISION OF HUMAN RIGHTS
/s/ WERNER H. KRAMARSKY
Commissioner

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS on the complaint of MIROSLAWA ROSENFELD,
Complainant,

—against—

UNITED AIRLINES, INC., J. F. KENNEDY INTERNATIONAL AIRPORT; JOHN L. HAMMADUE, MANAGER, STEWARDESS SERVICES; AND KAY O'BRIEN, SUPERVISOR, HANGAR 8,
Respondents.

Case No.
CS-32898-74

PROCEEDINGS IN THE CASE

On the 22nd day of March, 1974, the above-named Complainant filed a complaint with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondents with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice.

After due notice, the case came on for hearing before George S. Sable, Esq., a Hearing Examiner of the Division. The hearing was held on June 10, 1974, January 16, 1975 and March 21, 1975.

Complainant appeared at the hearing. Respondents were represented by Earl G. Dolan and Kenneth A. Knutson, Esqs. Complainant was represented by Cohen, Weiss & Simon, Esqs.,

by Michael E. Abrams, Esq., of Counsel. The Division was represented by Henry Spitz, Esq., General Counsel, by Rosamond Prosterman, Esq., of Counsel.

FINDINGS OF FACT.

1. Respondent United Airlines, Inc. (hereinafter "United"), is an air carrier doing business within the State of New York and maintaining facilities at Respondent J. F. Kennedy International Airport.

2. At all times herein pertinent, Respondent John L. Hammadue has been the manager of stewardess services for Respondent United and Respondent Kay O'Brien has been the supervisor at Hangar No. 8 at Respondent Airport.

3. Miroslawa Rosenfeld, the Complainant, commenced working for Respondent United on June 21, 1967 in the capacity of stewardess. On March 12, 1974, she learned she was pregnant and so advised the stewardess service office. She was asked by a supervisor to come into the office on March 13, 1974 to fill out certain papers. On or about March 14, 1974, she was placed on a mandatory maternity leave of absence. While on this status, she initiated her charges with the Division.

4. Section 12-B of the applicable (1972-74) collective bargaining agreement between Respondent United and its flight attendants represented by the Airline Pilots Association covers the subject of pregnant stewardesses. It reads as follows:

> "B. A stewardess shall, upon knowledge of pregnancy, discontinue flying. Upon request, the Company shall grant such stewardess a maternity leave of absence. Such stewardess must be available to return to active service as a stewardess within ninety (90) days following date of delivery unless additional time is deemed necessary by the Company's medical examiner. In no case shall such period to return exceed six (6) months. Return to active service is contingent on passing a Company physical examination. Such stewardess shall retain and accrue seniority during the leave of absence, however, she shall not accrue vacation or sick leave during the period of the leave and she shall not be eligible for sick leave benefits for time lost for pregnancy."

5. Respondent United applied its maternity policy applicable to stewardesses, as reflected in Section 12-B above, to the Complainant when notified by her of her pregnancy.

6. Respondent United required Complainant to cease flying after ten (10) weeks of pregnancy without any physical examination or consideration of whether Complainant was able to carry out her duties and responsibilities as a flight attendant.

7. The evidence does not support Respondent United's contention that its mandatory maternity leave policy is based upon a bond-fide occupational necessity.

8. The Federal Aviation Administration does not take the position that it requires airlines to automatically place pregnant stewardesses on maternity leave and suggests instead that the issue be dealt with on an individual basis.

9. Dr. Andre E. Hellegers, who testified as an expert on behalf of Complainant, is presently Professor of Obstetrics and Gynecology, Professor of Physiology and Biophysics and Director of the Kennedy Institute for the study of human reproduction and bioethics in Washington.

10. Dr. Hellegers testified and I find that in the first five months or twenty weeks of pregnancy, the expectant stewardess presents no greater risk than the non-pregnant stewardess that the twentieth to the twenty-eighth week of pregnancy is a "gray area" in which the individual condition of the pregnant stewardess has to be considered, and that it would not be unreasonable for an airline to require all pregnant stewardess to discontinue flying at the twenty-eighth week.

11. I find that Complainant was laid off by Respondent United at a time when there was no evidence that she was unable to perform all the duties of her position as a stewardess.

12. I further find that Respondent United refused to permit Complainant to continue working because it has created an

irrebutable presumption, not justified by the testimony in this proceeding, that pregnancy at any and every stage renders a stewardess unsafe to fly.

13. I find that Respondent United's maternity policy discriminates against females in general and Complainant in particular in that it singles out pregnancy for different treatment than any other physiological condition.

14. There is insufficient evidence to establish that J. F. Kennedy International Airport, or the individually named Respondents committed any unlawful discriminatory act against Complainant.

15. I find that Complainant incurred damages in the form of lost wages from the time she was laid off until the twenty-eighth week of her pregnancy or for a period of eighteen weeks, and that she is entitled to be compensated therefore.

16. Inasmuch as Complainant's claim as to sick leave benefits arose at a time when she was not claiming to be "sick," such claim had not matured at the inception of this proceeding and therefore is not disposed of in this Order.

DECISION.

On the basis of the foregoing, I find that Respondent United Airlines, Inc., discriminated against Complainant by laying her off because of her sex in violation of the Human Rights Law.

I further find, on the basis of the foregoing, that Respondent United's maternity leave policy discriminates against pregnant female stewardesses because of their sex, in violation of the Human Rights Law.

I further find, based upon the foregoing, that the awarding of back pay to the aggrieved Complainant for eighteen (18) weeks will effectuate the purposes of the Human Rights Law.

I further find that there is insufficient evidence to establish that Respondent J. F. Kennedy International Airport or either

of the individually named Respondents committed any unlawful discriminatory act against Complainant.

ORDER.

On the basis of the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

ORDERED, that the complaint against J. F. Kennedy International Airport, John L. Hammadue and Kay O'Brien be and the same hereby is dismissed, and it is further

ORDERED, that the Respondent United Airlines, Inc., its agents, representatives, employees, successors and assigns shall cease and desist from discriminating against any employee or individual in the term, conditions and privileges of employment because of the sex of such person; and it is further

ORDERED, that the Respondent United Airlines, Inc., its agents, representatives, employees, successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law.

1. Respondent United shall, within 30 days from the date this Order becomes effective, pay to Complainant back pay for the eighteen week period commencing March 14, 1974, less the standard payroll deductions, plus interest at the rate of six percent per annum from May 16, 1974, a reasonable intermediate date in accordance with Section 5001(b) of the CPLR. Respondent shall restore to Complainant all other rights, benefits and privileges to which she would have been entitled had she been employed for said period. Respondent shall furnish proof of such payment within ten (10) days thereof to the State Division of Human Rights, 270 Broadway, New York, New York 10007, Attention Legal Bureau.

2. Respondent shall permit pregnant stewardesses to work until their twentieth week of pregnancy provided that said stewardesses, if requested to do so, obtain from their doctor a

semi-monthly statement confirming that their continued employment as a stewardess is not a health or safety hazard.

3. From the twentieth to the twenty-eighth week of pregnancy, Respondent may disqualify a pregnant stewardess from further flight duty should it find, as a result of its own medical examination, that said stewardess can no longer perform her duties without risk to her health or the safety of the passengers and crew, or both.

4. During and after the twenty-eighth week of pregnancy, Respondent may disqualify a pregnant stewardess from further flight duty without regard to her physical condition at that time.

5. Respondent shall provide accrued sick leave benefits and disability benefits to female employees for pregnancy connected disabilities to the same extent it provides such benefits to employees for other types of temporary physical disability.

6. Respondent shall send a memorandum to all supervisory employees, agents, officers and to all recognized unions instructing them that it has a policy of non-discrimination because of sex in the treatment of employees, and that such supervisory employees, agents and/or representatives are required to implement said policy.

7. Respondent shall make available to the duly-authorized representatives of this Division such documents and information as may be necessary for the Division to ascertain whether there is compliance with this Order.

Dated: September 10, 1975

New York, New York

STATE DIVISION OF HUMAN RIGHTS
/s/ WERNER H. KRAMARSKY
Werner H. Kramarsky
Commissioner

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS on the complaint(s) of LINDA MORTIMER,
Complainant,

—against—

UNITED AIRLINES, INC.; EDWARD CARLSON, PRESIDENT; AND JOHN L'HOMMEDIEU, MANAGER,
Respondents.

Case No.
(S) CSF-34667-74
CSF-34856-74

NOTICE OF ORDER AFTER CONSOLIDATED HEARING

Sirs:

Please Take Notice that the within is a true copy of an Order issued herein by Werner H. Kramarsky, Commissioner of the State Division of Human Rights, after a hearing held before Hearing Examiner Amos Carnegie, Esq. In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at 2 World Trade Center, New York, New York 10047. The Order may be inspected by any member of the public during the regular office hours of the Division.

Please Take Further Notice that in accordance with Section 297-a of the New York State Human Rights Law, any party to the proceeding aggrieved by said Order of the Division may obtain review thereof in a proceeding before the State Human Rights Appeal Board, 2 World Trade Center, 82nd Floor, New York, New York 10047, provided such appeal is commenced

by the filing with the Board of a notice of appeal within fifteen (15) days after the service of this Order.

Dated: May 28, 1976

New York, New York

STATE DIVISION OF HUMAN RIGHTS
/s/ WERNER H. KRAMARSKY
Werner H. Kramarsky
Commissioner

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS on the complaint(s) of LINDA MORTIMER,
Complainant,

—against—

UNITED AIRLINES, INC.; EDWARD CARLSON, PRESIDENT; AND JOHN L'HOMMEDIEU, MANAGER,
Respondents.

Case No.
(S) CSF-34667-74
CSF-34856-74

PROCEEDINGS IN THE CASE

On the 4th and 20th days of September, 1974, the above-named Complainant filed complaints with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondents with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaints and that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice.

After due notice, the cases came on for a consolidated hearing before Amos Carnegie, Esq., a Hearing Examiner of the Division. The hearing was held on May 27, 1975.

Complainant appeared at the hearing. Respondents were represented by Richard Glanton and Edward Del Genio, Esqs., by Richard Glanton, Esq., of Counsel. The Division was represented by Beverly Gross, Esq., General Counsel, by Mildred Roth, Esq., of Counsel.

During the course of the hearing Division's attorney and Respondents' attorney stipulated as to the following:

"1. That the testimony of Doctor George Kidera, who testified on behalf of the Respondents in support of their defense of bona fide occupational qualification at page twenty-six through page seventy-nine, of the transcript, together with Respondents' Exhibits, A and B, submitted in connection with such testimony, at the hearing held on June 10th, 1974, in the case of Miroslawa Rosenfeld, against United Airlines, Inc., et al, case number CS-32898-74, be incorporated into this record as Hearing Examiner's Exhibit One, in Evidence.

"2. That the testimony of Doctor Andre E. Hellegers, who testified on behalf of the Division and the Complainant in rebuttal on the question of bona fide occupational qualification at page ninety-eight through page 201 of the transcript together with Complainant's Exhibits Three, Four and Five, and Respondents' Exhibit C, which were introduced into said record on pages 202 through 205 at the hearing held on January 16th, 1975, in the Rosenfeld case, be incorporated into this record, as Hearing Examiner's Exhibit Two, In Evidence.

"3. That the deposition of Doctor William Russell Winter, submitted on behalf of the Respondents at pages 223 and 224 of the transcript, and Respondents' Exhibit D, at the hearing held on March 21st, 1975, in the Rosenfeld case, be incorporated in this record as Hearing Examiner's Exhibit Three, In Evidence, on the same basis as they were admitted into the record in the Rosenfeld case, including arguments and objections of counsel and the rulings of the hearing examiner.

"4. That the affidavit with attachments of Captain John D. Smith, at page 230 of the transcript of the hearing held on March 21st, 1975, and marked Respondents' Exhibit E, in the Rosenfeld case, together with the testimony of Captain Smith, on behalf of the Respondents in the Rosenfeld case, at pages 229 through

256, of the transcript at such hearing, be incorporated in this record, as Hearing Examiner's Exhibit Four, In Evidence, on the same basis as they were admitted into the record in the Rosenfeld case, including arguments of counsel and objections of counsel and the hearing examiner's rulings thereon.

"5. That the affidavit of John Courtright, submitted on behalf of the Complainant at page 257 of the transcript of the hearing held on March 21st, 1975, in the Rosenfeld case, designated as Complainant's Exhibit Six therein, be incorporated into this record, on the same basis as it was submitted in the record in the Rosenfeld case, as Hearing Examiner's Exhibit Five, In Evidence."

Findings of Fact

1. Respondent United Airlines, Inc. (hereinafter "United"), is an air carrier doing business within the State of New York and maintaining facilities at Respondent J. F. Kennedy International Airport.

2. At all times pertinent, Respondent John L'Hommedieu has been the manager of stewardess services for Respondent United and Respondent Edward Carlson, its president.

3. Linda Mortimer, the Complainant, commenced working for Respondent United in or about 1964 in the capacity of flight attendant. On July 3, 1974, Complainant advised her supervisor, Karen Kolesar, that she was pregnant. She was told by Ms. Kolesar that it was the company's policy that she be required to go on maternity leave immediately. On July 3, 1974, she was placed on a mandatory maternity leave of absence. While on this status, she initiated her charges with the Division.

4. On or about July 18, 1974, Complainant was examined by her doctor and was advised that she could work until the end of August, 1974.

5. Complainant's baby was born on December 4, 1974.

6. On January 9, 1975, Complainant was authorized by her physician to return to work; she returned to work on February 28, 1975.

7. Complainant was temporarily disabled due to pregnancy from August 20, 1974 through January 9, 1975.

8. Section 12-B of the applicable (1972-74) collective bargaining agreement between Respondent United and its flight attendants represented by the Airline Pilots Association covers the subject of pregnant stewardesses. It reads as follows:

> "B. A stewardess shall, upon knowledge of pregnancy, discontinue flying. Upon request, the Company shall grant such stewardess a maternity leave of absence. Such stewardess must be available to return to active service as a stewardess within ninety (90) days following date of delivery unless additional time is deemed necessary by the Company's medical examiner. In no case shall such period to return exceed six (6) months. Return to active service is contingent on passing a Company physical examination. Such stewardess shall retain and accrue seniority during the leave of absence, however, she shall not accrue vacation or sick leave during the period of the leave and she shall not be eligible for sick leave benefits for time lost for pregnancy."

9. Respondent United required Complainant to cease flying without any physical examination or consideration of whether Complainant was able to carry out her duties and responsibilities as a flight attendant.

10. The evidence does not support Respondent United's contention that its mandatory maternity leave policy is based upon a bona fide occupational necessity.

11. The Federal Aviation Administration does not take the position that it requires airlines to automatically place pregnant stewardesses on maternity leave and suggests instead that the issue be dealt with on an individual basis.

12. Dr. Andre E. Hellegers, a specialist in fetal physiology and aviation medicine, testified and I find that in the first five months or twenty weeks of pregnancy, the expectant stewardess presents no greater risk than the non-pregnant stewardess; that the twentieth to the twenty-eight week of pregnancy is a "gray area" in which the individual condition of the pregnant stewardess has to be considered.

13. I find that Complainant was laid off by Respondent United at a time when there was no evidence that she was unable to perform all the duties of her position as a stewardess.

14. I further find that Respondent United refused to permit Complainant to continue working because it has created an irrebutable presumption, not justified by the testimony in this proceeding, that pregnancy at any and every stage renders a stewardess unsafe to fly.

15. Section 14 (Sick Leave) of the 1972-74 collective bargaining agreement provides in pertinent part:

> "A. Non-Occupational Sick Leave
>
> 1. A stewardess shall accrue two (2) hours of sick leave credit for each month during her first six (6) months of active employment. For each month of active employment thereafter, she shall accrue five (5) hours to a maximum of five hundred (500) hours. . . .
>
> 7. Sick leave pay shall be granted only in cases of actual sickness or injury . . ."

16. As of July 3, 1974, Complainant had accrued 126.7 hours sick leave.

17. Respondent United carries insurance covering disabilities sustained by employees in consequence of an accidental injury or sickness. It provides benefits of $53 a week for up to 26 weeks. Such insurance coverage excludes benefits for any disability which is caused by pregnancy, childbirth or miscarriage.

18. Under the Human Rights Law, employers must treat disabilities caused or contributed to by pregnancy, miscarriage,

abortion, childbirth, and recovery therefrom, as temporary disabilities under any health or temporary disability insurance or sick leave plan available in connection with employment.

19. The exclusion of disability benefits for pregnancy-connected disabilities in the Workmen's Compensation Law, Section 200 *et seq.*, relates to payment of benefits pursuant to that statute; it cannot be used by an employer to justify its failure to accord equal treatment to female employees in the terms, conditions and privileges of employment, as required by the Human Rights Law.

20. An employment provision with regard to fringe benefits, including health, and disability insurance which singles out pregnant women for different treatment, constitutes a discriminatory practice based upon sex.

21. Respondent United unlawfully discriminated against Complainant because of her sex in the terms, conditions and privileges of her employment, by failing to pay her the full amount of accrued paid sick leave and disability benefits for the time she was temporarily disabled from work by reason of her pregnancy to the same extent it provides such paid sick leave and disability benefits to other employees for non-pregnancy connected disabilities.

22. Respondent's employee benefit program discriminates against its female employees in the terms, conditions and privileges of their employment by failing to provide sick leave and disability benefits to employees who are unable to work because of pregnancy or pregnancy-related disability to the same extent it provides such benefits to employees unable to work because of non-pregnancy connected disabilities.

23. As of June, 1974, Complainant's monthly-base salary was eight hundred and thirty-four dollars ($835).

24. Both sick leave and disability benefits are paid concurrently by Respondent United to its employees.

25. I find that Complainant incurred damages in the form of lost wages from the time she was laid off on July 3, 1974

until August 20, 1974, the date her pregnancy-related disability commenced.

26. I further find that Complainant was unlawfully deprived of disability and sick leave benefits to the extent that same were accrued and not applied by Respondent United to cover the period of disability namely from August 20, 1974 through January 9, 1975.

27. There is insufficient evidence to establish that the individually named Respondents committed any unlawful discriminatory act against Complainant.

DECISION.

On the basis of the foregoing, I find that Respondent United Airlines, Inc., discriminated against Complainant by laying her off because of her sex in violation of the Human Rights Law.

I further find, on the basis of the foregoing, that Respondent United's maternity leave policy discriminates against pregnant stewardesses because of their sex, in violation of the Human Rights Law.

I further find, on the basis of the foregoing, that Respondent United's policies of disallowing accrued sick leave pay and disability benefits during the period of absence due to pregnancy-related disability, discriminated against pregnant stewardesses, in general, and Complainant, in particular, in violation of the Human Rights Law.

I further find, based upon the foregoing, that there is insufficient evidence to establish that Respondents Edward Carlson and John L'Hommedieu committed any unlawful discriminatory act against Complainant.

I further find, based upon the foregoing, that the awarding of compensatory damages to the aggrieved Complainant will effectuate the purposes of the Human Rights Law.

ORDER.

On the basis of the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

ORDERED, that the complaints against Edward Carlson and John L'Hommedieu be and the same hereby are dismissed, and it is further

ORDERED, that the Respondent United Airlines, Inc., its agents, representatives, employees, successors and assigns shall cease and desist from discriminating against any employee or individual in the terms, conditions and privileges of employment because of the sex of such person, and it is further

ORDERED, that the Respondent United Airlines, Inc., its agents, representatives, employees, successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

1. Respondent United shall within thirty (30) days from the date this Order becomes effective, pay to Complainant Linda Mortimer back pay for the period commencing July 3, 1974 and ending August 20, 1974, less the standard payroll deduction, plus interest at the rate of six percent per annum from July 28, 1974, a reasonable intermediate date in accordance with Section 5001(b) of the CPLR. Respondent shall restore to Complainant all other rights, benefits and privileges to which she would have been entitled had she been employed for said period. Respondent shall furnish proof of such payment within ten (10) days thereof to the State Division of Human Rights, 2 World Trade Center, New York, New York 10047, Attention Beverly Gross, Esq., General Counsel.

2. Respondent shall, within thirty (30) days from the date this Order becomes effective, pay to Complainant Linda Mortimer accrued sick pay and disability benefits for the period of Complainant's disability between August 21, 1974 and January 9, 1975, to the same extent such payments are made to its

other employees for non-pregnancy connected temporary physical disabilities, plus interest at the rate of six percent per annum from November 1, 1974, a reasonable intermediate dated in accordance with Section 5001(b) of the CPLR. Respondent shall restore to Complainant all other rights, benefits and privileges to which she would have been entitled had granted accrued sick leave and disability benefits between August 21, 1974 and January 9, 1975. Respondent shall furnish proof of such payment within ten (10) days thereof to the State Division of Human Rights, 2 World Trade Center, New York, New York 10047, Attention Beverly Gross, Esq., General Counsel.

3. Respondent shall permit pregnant stewardesses to work until their twentieth week of pregnancy provided that said stewardesses, if requested to do so, obtain from their doctor a semi-monthly statement confirming that their continued employment as a stewardess is not a health or safety hazard.

4. From the twentieth to the twenty-eighth week of pregnancy, Respondent may disqualify a pregnant stewardess from further flight duty should it find, as a result of its own medical examination, that said stewardess can no longer perform her duties without risk to her health or the safety of the passengers and crew, or both.

5. During and after the twenty-eighth week of pregnancy Respondent may disqualify a pregnant stewardess from further flight duty without regard to her physical condition at that time.

6. Respondent shall provide accrued sick leave benefits and disability benefits to female employees for pregnancy-connected disabilities to the same extent it provides such benefits to employees for other types of temporary physical disability.

7. Respondent shall send memorandum to all supervisory employees, agents, officers and to all recognized unions instructing them that it has a policy of non-discrimination because of sex in the treatment of employees (as provided in paragraphs 3 through 6 above); and that such supervisory employees, agents and/or representatives are required to implement said policy.

8. Respondent shall make available to the duly-authorized representatives of this Division such documents and information as may be necessary for the Division to ascertain whether there is compliance with this Order.

Dated: May 28, 1976.

New York, New York

State Division of Human Rights
/s/ WERNER H. KRAMARSKY,
Werner H. Kramarsky
Commissioner

STATE HUMAN RIGHTS APPEAL BOARD

STATE DIVISION OF HUMAN RIGHTS on the Complaint of MIROSLAWA ROSENFELD,
Complainant-Respondent,

vs.

UNITED AIR LINES, INC.,
Respondent-Appellant,

J. F. KENNEDY INTERNATIONAL AIRPORT; JOHN L. HAMMADUE, Manager Stewardess Services; and KAY O'BRIEN, Supervisor Hangar 8,
Respondents.

Case No. CS-32898-74
Appeal No. 3065

ORDER.

The above-entitled appeal having been filed with this Board on September 25, 1975 by Respondent-Appellant, United Air Lines, Inc., and having come on to be heard before the Honorable Tibby Blum on the 22nd day of July, 1976, and Respondent-Appellant having appeared by Kenneth A. Knutson, Esq., who argued and submitted a brief on behalf of Respondent-Appellant, and Complainant-Respondent having appeared by Cohen, Weiss and Simon, Esqs., Michael E. Abram, Esq., of Counsel, who argued and submitted a brief on behalf of Complainant-Respondent, and the State Division of Human Rights having appeared by Beverly Gross, Esq., General Counsel, Ann T. Anderson, Esq., of Counsel, who submitted a letter brief in support of the Commissioner's Order, and

The Board having reviewed the record and having considered the arguments and briefs on behalf of Respondent-Appellant and Complainant-Respondent and the letter brief of the Division of Human Rights and a majority of the Board having decided

that the Order appealed from herein is supported by substantial evidence on the record taken as a whole, and in conformity with the laws of the State of New York, it is

ORDERED that the Decision and Order of the Commissioner of the State Division of Human Rights made herein on the 10th day of September, 1975 be and the same hereby is in all respects affirmed.

STATE HUMAN RIGHTS APPEAL BOARD
By /s/ IRMA VIDAL SANTAELLA,
Irma Vidal Santaella,
Chairman

Dated and Mailed: April 22, 1977

To: (See attached list)

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

STATE DIVISION OF HUMAN RIGHTS on the complaint of LINDA MORTIMER,
Complainant-Respondent,

vs.

UNITED AIR LINES, INC.; EDWARD CARLSON, PRESIDENT; and JOHN L'HOMMEDIEU, MANAGER,
Respondents-Appellant.

Case Nos. CSF-34856-74
CSF-34856-74
Appeal No. 3558

ORDER.

The above-entitled appeal having been filed with this Board on June 17, 1976 and having come on to be heard before Honorable Richard Wong on the 10th day of December, 1976 and respondents-appellant having appeared by Richard H. Glanton, Esq., who argued and submitted a brief on behalf of respondents-appellant, and complainant-respondent and the State Division of Human Rights having appeared by Beverly Gross, Esq., Ann T. Anderson, Esq., of Counsel who argued and submitted a brief in support of the Commissioner's Order, and

The Board having reviewed the record and having considered the arguments and briefs of the parties, and a majority of the Board having decided that the Order appealed from herein is supported by substantial evidence on the record taken as a whole, and in conformity with the laws of the State of New York, it is

ORDERED that the Decision and Order of the Commissioner of the State Division of Human Rights made herein on May 28, 1976 be, and the same hereby is in all respects affirmed.

ALL MEMBERS CONCUR

STATE HUMAN RIGHTS APPEAL BOARD
By /s/ IRMA VIDAL SANTAELLA,
Irma Vidal Santaella,
Chairman

Dated and Mailed: July 6, 1977

To: (See attached list)

HON. HENRY J. LATHAM, *Justice Presiding,*
HON. VINCENT D. DAMIANI, *Associate Justice,*
HON. FRANK A. GULOTTA, *Associate Justice,*
HON. CHARLES MARGETT, *Associate Justice,*
HON. FRANK D. O'CONNOR, *Associate Justice.*

UNITED AIR LINES, INC.,
Petitioner,

vs.

STATE HUMAN RIGHTS APPEAL BOARD and STATE DIVISION OF HUMAN RIGHTS on the complaint of LINDA MORTIMER,
Respondents.

UNITED AIR LINES, INC.,
Petitioner,

vs.

STATE HUMAN RIGHTS APPEAL BOARD and STATE DIVISION OF HUMAN RIGHTS on the complaint of MIROSLAWA ROSENFELD,
Respondents.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 13, 1978.

ORDER.

The above consolidated proceedings having been instituted in this court pursuant to section 298 of the Executive Law, by petitions of United Air Lines, Inc., verified August 4, 1977 and May 24, 1977, respectively, to review two orders of the State Human Rights Appeal Board, dated July 6, 1977 and April 22, 1977, respectively, which, *inter alia,* affirmed separate orders of the State Commissioner of Human Rights declaring that petitioner's policy of mandatory, unpaid pregnancy leave consti-

tuted unlawful sex discrimination in violation of section 296 of the Executive Law; the respondents State Division of Human Rights and Miroslawa Rosenfeld having filed answers thereto;

Now, upon the said petitions; the briefs of petitioner; the said answers and briefs of the respondents State Division of Human Rights and Miroslawa Rosenfeld; and upon all the papers filed herein; and the proceedings having been argued by Earl G. Dolan, Esq., of counsel for the petitioner, argued by Ann Thacher Anderson, Esq., of counsel for the respondent State Division of Human Rights and argued by Michael E. Abram, Esq., of counsel for the respondent Rosenfeld, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is unanimously

ORDERED that the orders are hereby confirmed and the petitions dismissed, without costs or disbursements.

Enter:

/s/ IRVING N. SELKIN,
Clerk of the Appellate Division.
A/ms

..... AD2d .....

A—October 20, 1977

2168 E
2571 E

United Air Lines, Inc., petitioner, v. State Human Rights Appeal Board and State Division of Human Rights on the complaint of Linda Mortimer, respondents.

United Air Lines, Inc., petitioner, v. State Human Rights Appeal Board and State Division of Human Rights on the complaint of Miroslawa Rosenfeld, respondents.

Timothy P. Walsh, Hardin, Hess and Walsh, New York, N. Y. and Michael A. Katz, Chicago, Ill. (Earl G. Dolan of counsel), for petitioner.

William M. Miles, New York, N. Y. (Ann Thacher Anderson of counsel), for respondent State Division of Human Rights.

Cohen, Weiss and Simon, New York, N. Y. (Michael E. Abram of counsel), for respondent Rosenfeld.

Consolidated proceedings pursuant to section 298 of the Executive Law to review two orders of the State Human Rights Appeal Board, dated April 22, 1977 and July 6, 1977, respectively, which, *inter alia*, affirmed separate orders of the State Commissioner of Human Rights declaring that petitioner's policy of mandatory, unpaid pregnancy leave constituted unlawful sex discrimination in violation of section 296 of the Executive Law.

Orders confirmed and petitions dismissed, without costs or disbursements.

The determinations under review are supported by sufficient evidence on the record considered as a whole (see Executive Law, § 298).

LATHAM, *J.P.*, DAMIANI, GULOTTA, MARGETT and O'CONNOR, *JJ.*, concur.

March 13, 1978

UNITED AIR LINES v. STATE HUMAN RIGHTS APPEAL BOARD

2168 E
2571 E

STATE OF NEW YORK,
Court of Appeals.

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

Mo. No. 490

UNITED AIR LINES, INC.,
Appellant,

vs.

STATE HUMAN RIGHTS APPEAL BOARD and STATE DIVISION OF HUMAN RIGHTS on the complaint of LINDA MORTIMER,
Respondents.

UNITED AIR LINES, INC.,
Appellant,

vs.

STATE HUMAN RIGHTS APPEAL BOARD and STATE DIVISION OF HUMAN RIGHTS on the complaint of MIROSLAWA ROSENFELD,
Respondents.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of June A. D. 1978.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/s/ JOSEPH W. BELLACOSA,
Joseph W. Bellacosa,
Clerk of the Court

IN THE UNITED STATES DISTRICT COURT.
FOR THE EASTERN DISTRICT OF VIRGINIA.
Alexandria Division.

KAREN CONDIT and MARY E. ORAVEC, *Plaintiffs,* *vs.* UNITED AIR LINES, INC., *Defendant.*	Filed September 3, 1976 Clerk U. S. District Court Alexandria Virginia Civil Action No. 74-250-A

MEMORANDUM OPINION AND ORDER.

Karen Condit brought this class action, on behalf of herself and those similarly situated, against her employer, United Air Lines, Inc., under Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-5(f)(3), claiming that United's policy regarding maternity leave and disability coverage for pregnant stewardesses is unlawful under 42 U. S. C. § 2000e-2(a).

Mary Oravec was permitted to intervene as a party plaintiff.

The policy has been incorporated in and made a part of ALPA collective bargaining agreement with United since October of 1969. It reads as follows:

> "A stewardess shall, upon knowledge of pregnancy, discontinue flying. Upon request, the Company shall grant such stewardess a maternity leave absence. Such stewardess must be available to return to active service as a stewardess within ninety (90) days following date of delivery unless additional time is deemed necessary by the Company's medical examiner. In no case shall such period to return exceed six (6) months. Return to active service is contingent on passing a Company physical examination. Such stewardess shall retain and accrue seniority during the leave of absence; however, she shall not accrue vacation

> or sick leave during the period of the leave and she shall not be eligible for sick leave benefits for time lost for pregnancy.
>
> * * * * *
>
> "Sick leave pay shall be granted only in cases of actual sickness or injury. A stewardess may make up non-occupational sick leave in accordance with Section 6, Paragraph H."

United claims that its policy of requiring stewardesses to discontinue flying upon knowledge of pregnancy is not discrimination based on sex—and, if so, its maternity leave policy is justified as a bona fide occupational qualification pursuant to 42 U. S. C. § 2000e-2(e).

Count One of the complaint challenges United's maternity leave policy requiring stewardesses to discontinue flying upon knowledge of pregnancy.

Count Two challenges United's exclusion of pregnancy from its sick leave and disability coverage.

This Court has stayed its ruling on the plaintiff's motion for summary judgment as to Count Two pending the decision of the Supreme Court of the United States in Gilbert v. General Electric Company, 519 F. 2d 661 (4th Cir. 1975) (on appeal from the Richmond Division of this court. That appeal is still pending before the Supreme Court and probably will not be reached before early 1977—Therefore this Court's ruling on the plaintiff's motion for summary judgment as to Count Two will be further delayed until the Supreme Court renders its decision in Gilbert v. General Electric Company.

Although this Court has delayed its rulings on the issues raised in Count One of this complaint in the hope that the Supreme Court decision in the Gilbert case might shed some light on the path that should be followed in the premises, further delay cannot be justified.

Count One was heard by the Court on stipulations, exhibits and live testimony.

The record thus made discloses that Karen Condit reported to her supervisor on July 5, 1972 that she was pregnant. She was refused permission to make her scheduled flight on that date and advised that she would be placed on mandatory maternity leave effective July 5, 1972. Her child was born on November 15, 1972 and approximately ninety days thereafter she applied for and was granted a ninety-day extension of her maternity leave—She resigned when that extension was about to expire.

Mary Oravec reported to her supervisor on October 10, 1972 that she was pregnant—She was refused permission to make her scheduled flight on that date and was advised that she would be placed on mandatory maternity leave effective October 10, 1972. Her child was born March 16, 1973—Approximately ninety days thereafter she applied for and was granted a ninety-day extension of her maternity leave. She returned to active duty as a stewardess on September 1, 1973.

United did not cause any medical examination to be made of Mrs. Condit or Mrs. Oravec for the purpose of determining whether their condition rendered either or both of them incapable of performing their duties as stewardesses.

During the years 1972, 1973 and 1974 approximately one thousand of United's stewardesses reported their pregnancy—All were placed on maternity leave.

Although United does not know at what stage its stewardesses reported their pregnancy, a sampling of some 362 of its stewardesses placed on maternity leave discloses that 43% reported their pregnancy at the end of the eighth week and 57% reported their pregnancy after the eighth week.

Captain Smith of United testified that most of their pregnant stewardesses were placed on leave by the end of the fourth month of pregnancy.

The plaintiff Oravec was in her 17th week when she reported her pregnancy—The plaintiff Condit was in her 20th week.

Section 601(b) of the Federal Aviation Act of 1958, 49 U. S. C. § 1421(b), provides that airlines have the duty to perform their services with the highest possible degree of safety in the public interest.

All carriers engaged in air transportation are subject to regulation by the Federal Aviation Administration and its Administrator on matters including safety, and the Administrator has been directed by Congress to promote safety of flight in air commerce by prescribing regulations and standards concerning both equipment and personnel.

United usually assigns more flight attendants on its flights than the number required by the Federal Aviation Administration.

The position of FAA regarding policies of air carriers that require all stewardesses to discontinue flying upon knowledge of pregnancy is—

> The FAA has not set forth limits for crew members because of pregnancy. Basically, we feel that a pregnant woman with no complications is in good health. Consideration of whether a flight attendant should fly when pregnant is a matter between herself, her doctor and her employer. It must be remembered, however, that flight attendants, when serving as required crew members, should be able to perform all assigned tasks.

For an aircraft to be certified by the FAA it must, among other things, be demonstrated that the aircraft can be fully evacuated in ninety seconds using only 50% of the exits of the said aircraft.

Evacuation of passengers from the aircraft during emergencies is the sole function and responsibility of the flight attendants.

Planned evacuation procedures have been averaging about once a week on United's aircraft and unplanned evacuations have been occurring a little more than every two months.

The question of maternity leave and pregnancy disability policies in the airline industry has been considered by task forces

established by the major industry organizations, the Air Conference and ATA—Numerous meetings have been held.

The committee generally agreed that pregnant stewardesses should be placed on leave as soon as they reported their pregnancy.

All major airlines, except Northwestern, follow that recommendation.

Northwestern's policy is to have the flight attendant fly while pregnant as long as she wishes providing she brings in a weekly letter from her physician after the sixth month approving her continued employment.

The medical evidence tendered was in conflict on the question of whether or not pregnant stewardesses should fly—All agree that common occurrences in early pregnancy are fatigue, fainting, morning sickness, nausea and back strain. In addition, 15 to 18 per cent of pregnancies result in spontaneous abortion during the first trimester. Although these symptoms do not occur in every individual pregnancy, it is impossible to predict in advance when and if any individual may develop one or more of the said symptoms—Flying neither causes nor aggravates any of these symptoms.

Dr. Kidera, United's specialist in aviation medicine since 1938, testified pregnant stewardesses should not fly.

Dr. Wolff was of a like opinion due to hormonal and emotional changes during pregnancy.

Dr. Winter testified that United's maternity leave policy was medically sound and would be recommended by him.

Dr. Hellegers testified that virtually all stewardesses who are otherwise healthy could perform their duties as well as a non-pregnant stewardess through the 20th week of pregnancy, virtually all could not perform safely and efficiently after the 28th week of pregnancy, and the capacity to perform safely and efficiently during the 21st through the 28th week would depend entirely upon factors that vary from individual to individual

so that the decision as to capacity would have to be individualized during that period—The question of capacity depends upon weight, gain and abdominal distention or girth as those factors reduce balance and mobility.

Dr. Hellegers further testified that if forced to choose an arbitrary date, he would place the cut-off date at 24 weeks since more than 50% of pregnant stewardesses would be capable of performing their duties at that stage.

Dr. Carter of the Mayo Clinic, Ob-Gyn Department, agreed that pregnant stewardesses can perform as well as non-pregnant stewardesses until such time in pregnancy as abdominal distention substantially reduces mobility.

The only clear area of agreement amongst the doctors that testified in this case is that there are virtually no studies or empirical data directly relating to the issues here except for oxygenation and peripheral studies on the physical capacity of pregnant women in sports competition. This is true both with respect to published studies in medical and scientific literature and with respect to internal studies by United or other air carriers.

The initial question for determination is whether United's policy of requiring its stewardesses to discontinue flying upon knowledge of pregnancy constitutes a prima facie violation of Title VII, as amended.

United's mandatory leave policy applies only to pregnant stewardesses. Clearly this is not a discrimination based solely on sex—United's maternity leave policy—if it be discrimination —is based on an exclusive female condition—pregnancy.

Title 42 U. S. C. § 2000e-2 provides in part—

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The legislative history of Title VII prohibitions against discrimination on account of sex is extremely sparse—some nine pages in the Congressional Record. What Congress in effect said was that the Title VII sex discrimination provisions did not reach those situations where men and women were not similarly situated.

Fourteen members of the House Committee on the Judiciary, in considering the equal rights amendment, stated that the original resolution does not require that women must be treated in all respects the same as men—Quality [sic] does not mean sameness. As a result the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex—For example, a law providing for payment of medical costs of child bearing could only apply to women.

Proponents of ERA have continuously contended that laws concerning child bearing and other matters relating to physical characteristics unique to one sex are not laws which discriminate upon the basis of sex.

The plaintiffs argue that the Supreme Court of the United States has broadened the prohibited Title VII discrimination to include sex plus another factor, that is, women with young children, citing Phillips v. Martin Marietta Corp., 400 U. S. 542 (1970), and Sprogis v. United Air Lines, 444 F. 2d 1194 (7th Cir. 1971). The factor in this case, pregnancy, is applicable to women only.

Cleveland Board of Education v. LaFleur, 414 U. S. 632 (1974), relied on by the plaintiffs does not deal with the question here, that is, whether a mandatory leave policy occasioned by pregnancy constitutes a prima facie violation of Title VII, as amended.

The defendant relies in the main on Geduldig v. Aiello, 417 U. S. 484 (1974), which they read to say there is no sex discrimination when the policy [as here] relates solely to pregnant women and no other persons.

None of the cases cited by the parties or the legislative history is dispositive of the question here raised.

Although the undersigned has grave doubts that United's mandatory leave policy constitutes a Title VII employment discrimination on account of sex, that question need not be answered because on the record here made United's mandatory leave policy is justified as a bona fide occupational qualification pursuant to 42 U. S. C. § 2000e-2(e), which reads:

"Notwithstanding any other provisions of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."

United is a common carrier charged with exercising the highest degree of care for the safety of its passengers—Said another way, the FAA statute, 49 U. S. C. § 1421(b), requires airlines to perform their services with the highest possible degree of safety in the public interest.

In short, the law imposes on United the obligation of taking no chances when it comes to safety.

Flight attendants are responsible for the comfort and safety of the passengers in both calm and turbulent air—They are the sole company employees that evacuate passengers during emergencies—They must demonstrate that an aircraft can be fully

evacuated in ninety seconds using only half of its exits—They work in close and cramped quarters.

United's planned evacuation procedures have been averaging about once a week—Unplanned evacuations have been occurring a little more often than every two months.

Pregnant stewardesses are more susceptible to cramp, fatigue, back strain, nausea and vomiting than non-pregnant stewardesses—There is also the danger of spontaneous abortion and hormonal changes in pregnant women, particularly in the early stages.

Although these symptoms do not occur in every individual pregnancy—and flying neither causes nor aggravates any of them—it is impossible to predict when and if any individual may develop one or more of them.

A committee composed of medical directors of all of the major airlines has generally agreed that pregnant stewardesses should report their pregnancy as soon as aware, stop flying and go on maternity leave. Though it was further agreed that perhaps this view could not be supported solely from medical statistics, they all agreed that the problem could not be divorced from operational aspects.

All of the major airlines follow this recommendation, except one—By contract Northwestern permits pregnant stewardesses to fly up to six months or until she can no longer wear her uniform.

United's employment contract with the union representing its flight attendants provides that stewardesses must upon knowledge of pregnancy discontinue flying and . . . that she shall not be eligible for sick leave benefits for time lost for pregnancy.

Two of the non-airline medical experts that testified were of the opinion that pregnant stewardesses should not fly—One said virtually all otherwise healthy, pregnant stewardesses could perform their duties as well as non-pregnant stewardesses through the 20th week—none after the 28th week—during the 21st

through the 28th week dependent upon weight gain and abdominal distention or girth—Another agreed that pregnant stewardesses could perform as well as non-pregnant stewardesses until such time as abdominal distention substantially reduced mobility.

United justifies its long-standing mandatory maternity leave policy upon its common law and statutory duty of exercising the highest possible degree of care for the safety of its passengers.

Though unpredictable as to time and place, they have shown that one or more of the foregoing pregnancy problems could suddenly manifest itself, and if this happened during an emergency United would have been derelict in its duty to the flying public were it to permit pregnant stewardesses to continue working while flying.

The FAA requires pilots to cease commercial flying at age sixty as a safety precaution.

The Second Circuit in Alpa v. Quesada, 276 F. 2d 892 (1960), held—

> ". . . [A]vailable medical studies show that sudden incapacitation due to heart attacks or strokes become more frequent as men approach age sixty and present medical knowledge is such that it is impossible to predict with accuracy those individuals most likely to suffer attacks. . . ."

Although required by Congress to promote safety of flight in air commerce—concerning both equipment and personnel (see 49 U. S. C. §§ 1421-30)—the FAA has not set forth limits for crew members because of pregnancy.

Whether pregnant stewardesses should fly is left up to the stewardess, her doctor and the airline—FAA cautions, however, that flight attendants should be able to perform all of their assigned duties.

It is just as probable that a pregnant stewardess may be confronted with a sudden incapacity associated with her pregnancy as a sixty-year-old pilot with an unexpected heart attack—Either

or both would jeopardize the safety of the passengers during an emergency.

The plaintiffs' argument that pregnant stewardesses should not be grounded during the first five or six months of pregnancy —absent individualized medical support—is best answered by the reasoning of the Seventh Circuit in Hodgson v. Greyhound Lines, Inc., 499 F. 2d 859 (1974). There the Court stated—

> "As reflected in the Spurlock [Spurlock v. United Airlines, Inc., 475 F. 2d 216 (10th Cir. 1972)] decision, a public transportation carrier, such as Greyhound, entrusted with the lives and well-being of passengers, must continually strive to employ the most highly qualified persons available for the position of intercity bus driver for the paramount goal of a bus carrier is safety. Due to such compelling concerns for safety, it is not necessary that Greyhound show that all or substantially all bus driver applicants over forty could not perform safely. Rather, to the extent that the elimination of Greyhound's hiring policy may impede the attainment of its goal of safety, it must be said that such action undermines the essence of Greyhound's operations. Stated differently, Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers. Greyhound need only demonstrate however, a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice."

Chief Justice Burger, in a Title VII racial discrimination case, said:

> "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." Griggs v. Duke Power Co., 401 U.S. 424 (1971).

United has clearly shown by the record here made that its mandatory maternity leave policy has a manifest relationship to the continuing employment of stewardesses during their pregnancy.

The safety of the passengers must come first—In case of doubt, that doubt must be resolved in favor of the passengers—Airlines must take no chances when it comes to safety.

Taking into account the total pregnancy picture as here shown, United is justified in enforcing its mandatory maternity leave policy as a bona fide occupational qualification for the continued employment of stewardesses during their pregnancy.

The real issue here does not appear to be United's mandatory maternity leave policy—It appears to be its refusal to recognize pregnancy as a compensable sickness or disability. That question is the heart of Count Two of this complaint and it no doubt will be definitively answered when the Supreme Court renders its decision in the Gilbert case.

For the reasons stated, Count One should be dismissed, and It Is So Ordered.

This Court's ruling on the plaintiffs' motion for summary judgment as to Count Two will be further delayed pending the Supreme Court ruling in the premises.

The Clerk will send a copy of this memorandum opinion and order to all counsel of record.

/s/ OREN R. LEWIS
United States Senior Judge

September 3, 1976

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 76-2296

KAREN CONDIT AND MARY E. ORAVEC,
Appellants,

v.

UNITED AIR LINES, INC.,
Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

Argued April 7, 1977 Decided July 28, 1977

Before WINTER, BUTZNER and HALL, *Circuit Judges.*

Martin J. Flynn (Wendy S. White, Shea & Gardner on brief) for Appellants; Kenneth A. Knutson (Joseph A. Rafferty, Jr., and Earl G. Dolan on brief) for Appellee; (Abner W. Sibal, General Counsel, Joseph T. Eddins, Associate General Counsel, Lutz Alexander Prager and Marilyn S. G. Urwitz, Attorneys, Equal Employment Opportunity Commission on brief as Amicus Curiae).

Per Curiam:

Karen Condit, a stewardess representing a class composed of herself and all others similarly situated, and Mary E. Oravec, an intervenor, appeal from an order of the district court holding that the maternity leave policy of United Air Lines, Inc., constitutes a bona fide occupational qualification under § 703(e) of Title VII of the Civil Rights Act of 1964, as amended (42 U. S. C. § 1 2000e-2(e)). We affirm.

United requires that all stewardesses discontinue flying as soon as they become aware that they are pregnant. The stewardesses contend that each stewardess should be allowed to continue working as long as she can safely perform her duties.

The district court found, on conflicting expert testimony, that pregnancy could incapacitate a stewardess in ways that might threaten the safe operation of aircraft. It therefore concluded that United's policy of refusing to allow stewardesses to fly from the time they learned they were pregnant was consistent with a common carrier's duty to exercise the highest degree of care for the safety of its passengers.*

The district court's ruling that United's policy is a bona fide occupational qualification is based on findings of fact which, on the evidence presented by this record, are not clearly erroneous. Fed. R. Civ. P. 52(a). Accordingly, the judgment is affirmed.

---

* In the only other reported case on the subject that has been brought to our attention, the court held that a pregnant stewardess can be automatically barred from flying under the bona fide occupational qualification rationale only after the twentieth week. *In Re:* National Airlines, Inc., Maternity Leave Practices and Flight Attendant Weight Program Litigation, No. 75-719-Civ-NCR (S. D. Fla. May 17, 1977).

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D. C. 20543

March 20, 1978

Kenneth A. Knutson, Esq.
P. O. Box 66100
Chicago, Ill. 60666

Re: Karen Condit and Mary C. Oravec v. United Air Lines, Inc. No. 77-1060

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Mr. Justice Stewart would grant certiorari.

Very truly yours,

MICHAEL RODAK, JR.,
Clerk

By
/s/ J. H. LAZOWSKI
Assistant Clerk

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-414

UNITED AIR LINES, INC.,

Petitioner,

vs.

STATE HUMAN RIGHTS APPEAL BOARD AND STATE DIVISION OF HUMAN RIGHTS ON THE COMPLAINTS OF LINDA MORTIMER AND MIROSLAWA ROSENFELD,

Respondents.

BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

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Respondents.

BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

Question Presented

In view of the provisions in the Civil Rights Act of 1964 which preserve State fair employment legislation providing more comprehensive protection to employees than what is afforded by Title VII, does the Supremacy Clause or the Commerce Clause invalidate a decision of the New York Court of Appeals letting stand a decision of the Appellate Division* requiring petitioner to stop compelling New York-based flight attendants who become pregnant to take unpaid leave immediately upon notification of pregnancy?

* *United Air Lines, Inc.* v. *State Human Rights Appeal Board*, 61 App.Div.2d 1010, 420 N.Y.S.2d 630 (2d Dept. 1978), *appeal denied*, 44 N.Y.2d 641, —— N.E.2d ——.

Statement of the Case

Petitioner would have this Court review application of New York's fair employment legislation, N.Y. Executive Law Art. 15 (McKinney's 1972), hereinafter "the Human Rights Law", to an interstate air carrier which compels flight attendants to take unpaid leave immediately upon notification of pregnancy.

After investigation and public hearings under the Human Rights Law, the State Division of Human Rights issued orders finding petitioner's practice discriminatory as to sex, except with respect to flight attendants more than 27 weeks pregnant. The Division's orders (1) require petitioner to allow any pregnant flight attendant to work until the 20th week of pregnancy upon the certification by her physician that such employment is not a hazard to health or safety; (2) permit petitioner, after medical examination by its own physician, to disqualify from flight duty a flight attendant who is 20-28 weeks pregnant, if such examination shows she can no longer perform her duties without risk to her health or to the safety of passengers and crew; and (3) permit petitioner to disqualify from flight duty any flight attendant who is more than 27 weeks pregnant.

Although the Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. §§2000a *et seq.*, recognizes and preserves State fair employment legislation providing more comprehensive protection to employees, petitioner perceives a conflict with Title VII, 42 U.S.C. §§2000e-1 *et seq.*, and decisions thereunder, and perceives that conflict to be sufficient to raise a question under the Commerce and Supremacy Clauses, U.S. Const. Art. I, §8 cl.3, Art. VI cl.2.

The Division respectfully submits, for the reasons set forth below, that petitioner does not raise a substantial Federal question warranting certiorari.

Reasons Certiorari Should Be Denied

I. Petitioner raises no substantial question under the Supremacy Clause.

Petitioner relies on *Condit* v. *United Air Lines, Inc.*, 13 FEP Cases 689 (E.D. Va. 1976), *aff'd*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, —— U.S. ——, 97 S.Ct. 1510, 55 L.Ed.2d 531 (1978), to justify its petition to this Court. *Condit* holds that petitioner's compulsory maternity leave rule is permissible under Title VII. *Contra*: *MacLennan* v. *American Airlines, Inc.*, 440 F. Supp. 466 (E.D. Va. 1977), *appeal pending; In re Nat. Airlines, Inc.*, 434 F. Supp. 249 (S.D. Fla. 1977).

Condit does not adjudicate the question whether that rule is required by the Federal Aviation Act, 72 Stat. 731, as amended, 49 U.S.C. §§1301 *et seq.*, or whether pregnancy as such on the part of a flight attendant constitutes a risk to safety in flight. *Condit* does not refute the Division's findings (Petition at A5, A14) that the Federal Aviation Administration, instead of requiring categorical exclusion of pregnant flight attendants from flight duty, suggests that the question of their fitness to work be determined case by case.*

It is just this process of determination case by case which the Division's orders permit and provide. Petitioner

* A similar conclusion was reached in *Burwell* v. *Eastern Airlines, Inc.*, Civ. No. 74-0418-R (E.D. Va. September 6, 1978).

need not retain on flight duty any flight attendant whose pregnancy has been medically certified to be disabling or to constitute a risk to safety. What the Division's orders forbid is wholesale exclusion based on pregnancy as such and nothing more.

Interpretation of Title VII does not always control interpretation of the Human Rights Law. *Brooklyn Union Gas Co.* v. *State Human Rights Appeal Board*, 41 N.Y.2d 84, 359 N.E.2d 393 (1976). Title VII not only recognizes and preserves State fair employment legislation, but permits such legislation to provide more protection, and more stringent sanctions, than Title VII itself. When the State statute permits what Title VII prohibits, there is conflict, and Title VII will supersede. 42 U.S.C. §200h-4. But when the State statute prohibits what Title VII permits, there is no conflict, no supersedure, no question under the Supremacy Clause. See *Thomas Publishing Co.* v. *State Div. of Human Rights*, —— F. Supp. ——, No. 77 Civ. 3290 (S.D.N.Y. September 19, 1978). States remain free, after as before enactment of Title VII, "to extend the area of non-discrimination beyond that which the Constitution itself exacts", Frankfurter, J., concurring, in *Railway Mail Association* v. *Corsi*, 326 U.S. 88, 98 (1945).

II. Petitioner raises no substantial question under the Commerce Clause.

Petitioner asserts that the decisions and administrative orders below create an undue burden on interstate commerce "by intruding into an area in which uniformity of operation on a nationwide basis is essential." Petition at 10. Petitioner overlooks the uniformity which could be

achieved by complying with those decisions and orders, and observing and giving effect to them nationwide. Neither Title VII nor the Federal Aviation Act stands in the way of such compliance. See *MacLennan* v. *American Airlines, Inc., supra; In re Nat. Airlines, Inc., supra; Burwell* v. *Eastern Airlines, supra.* The air carriers themselves are not uniform in their practices governing pregnant flight attendants. Variations between Federal, State and local prohibitions against discrimination do not create an unconstitutional burden. *Colorado Anti-discrimination Comm.* v. *Continental Air Lines*, 372 U.S. 714, 83 S. Ct. 1022, 10 L.Ed.2d 84 (1963). Implicit in the provisions of the Civil Rights Act of 1964 recognizing and preserving State and local fair employment legislation and deferring to the jurisdiction and remedial power of agencies enforcing such legislation, 42 U.S.C. §§2000e-4(f)(i), 2000e-5(b)-(e), 2000e-7, 2000e-8(b), 2000h-4, is a Congressional finding that application of such legislation to employers in interstate commerce imposes no undue burden.

The insubstantiality of petitioner's question under the Commerce Clause is clear from the fact that petitioner did not raise it before the Division or on appeal to the State Human Rights Appeal Board, and did not regard it as an appropriate basis for an appeal to the New York Court of Appeals as of right pursuant to N.Y. Civil Practice Law and Rules §5601(b) (McKinney's 1963 and Supp.).

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, N.Y.
October 30, 1978

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In The

Supreme Court of the United States

October Term, 1978

No. 78-414

UNITED AIR LINES, INC.,

Petitioner,

vs.

STATE HUMAN RIGHTS APPEAL BOARD and STATE DIVISION OF HUMAN RIGHTS on the complaints of LINDA MORTIMER and MIROSLAWA ROSENFELD,

Respondents.

BRIEF OF RESPONDENT MIROSLAWA ROSENFELD IN OPPOSITION

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No. 78-414

UNITED AIR LINES, INC.,

Petitioner,

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STATE HUMAN RIGHTS APPEAL BOARD and STATE DIVISION OF HUMAN RIGHTS on the complaints of LINDA MORTIMER and MIROSLAWA ROSENFELD,

Respondents.

BRIEF OF RESPONDENT MIROSLAWA ROSENFELD IN OPPOSITION

Jurisdiction

The order of the New York Court of Appeals was entered on June 13, 1978. The petition for a writ of certiorari was filed by United Air Lines, Inc. ("United") on September 11, 1978. The jurisdiction of this Court was invoked under 29 [sic] U.S.C. Section 1257(3). (Pet.12).

United's claim that state regulation in this field is pre-empted by federal regu-

lation (Pet. 10) was not raised in the state administrative agencies below. According to the Petition (p.7), United's claim that state regulation posed a potential conflict with federal regulation under Title VII was not raised until the initial appeal from the decision of the Human Rights Division below.

Statutes Involved

The New York State Human Rights Law, Executive Law §296, provides in pertinent part:

> "1. It shall be an unlawful discriminatory practice:
>
> (a) For an employer...because of the...sex...of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

The applicable provisions of the New York State Human Rights Law, Executive Law §298 are as follows:

> "No objection that has not been urged in prior proceedings shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances...The findings on which such order [of the Division] is based shall be conclusive if

> supported by sufficient evidence on the record considered as a whole."

The relevant portions of Sections 601 (a) and (b) of the Federal Aviation Act of 1958, 49 U.S.C. §1421(a) and (b) are as follows:

> "(a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:
>
> (5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and
>
> (6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.
>
> (b) In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make

classifications of such standards, rules, regulations and certificates appropriate to the differences between air transportation and other air commerce."

Section 708 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-7, provides:

"Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."

Section 1104 of Title XI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000h-4, provides:

"Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

Questions Presented

1. Whether the decision of the New York State Division of Human Rights finding that United's mandatory pregnancy leave policy for flight attendants based in New York contravenes state prohibitions against sex discrimination, which is consistent with the decisions of three Federal District Courts under Title VII and the policies of at least two other air carriers, and which comports with express FAA policies, is in conflict with Title VII or any other law of the United States.

2. Whether the sexually discriminatory employment policies of an employer which employs persons within the state of New York are exempt from a regulation by New York State by virtue of the employer's participation in interstate commerce where Congress has expressly deferred to state regulation in this field; such regulation does not burden interstate commerce; and the petitioner offered no evidence of such burden below.

3. Whether the Court has jurisdiction to issue a writ of certiorari where petitioner's claims were not properly advanced in the original proceedings below.

Statement

a. Background.

Respondent Miroslawa Rosenfeld is a New York State resident who has been employed as a flight attendant by United since 1967. At all relevant times she has been based in New York State and covered by applicable New York State regulation with respect to disability, workers compensation, unemployment insurance, employment discrimination and the like. In March 1974, respondent learned that she was pregnant and so advised her supervisors. Pursuant to United's mandatory leave policy (Pet. 4),* respondent was immediately placed on a mandatory pregnancy leave, without right to accrued sick leave or disability benefits. At the time respondent was ten weeks pregnant and had experienced no difficulties in work performance. No company medical examination was conducted to contradict the findings of Ms. Rosenfeld's obstetrician that she was in good health and capable of performing all flight duties. (Pet. App. A4-A5).

---

*Page references to the Petition for a Writ of Certiorari are cited as "Pet." References to the Appendix to the Petition are cited as "Pet.App.A" References to the Appendix to this Brief are cited as "A".

b. Proceedings in the New York State Human Rights Division.

Following the inception of the mandatory maternity leave, Ms. Rosenfeld filed a complaint with the Human Rights Division asserting that United's imposition of a mandatory leave and denial of benefits during the leave each constituted discrimination on the basis of sex within the New York State Human Rights Law, Executive Law §296 (Pet.App. A4). A full hearing was held on the complaint of Ms. Rosenfeld before a hearing examiner of the State Division of Human Rights on June 10, 1974, January 15, 1975 and March 21, 1975. United appeared and defended. United's sole defense was that the mandatory maternity leave policy was a bona fide occupational qualification ("BFOQ") based on the safety responsibilities of flight attendants on United's aircraft (Pet. 607). Both parties introduced medical and other testimony.

Based on the record testimony, the Human Rights Division found that Ms. Rosenfeld was placed on maternity leave by United without conducting or considering any medical examination as to her fitness or eligibility to continue work as a flight attendant during that stage of her pregnancy. The Division further found that she was placed on leave "at a time when there was no evidence that she was unable to perform all her duties as a flight attendant," and that United "created an irreputable presumption, not justified by the testimony in this case, that pregnancy at any and every stage renders a stewardess unsafe to fly." The Division concluded that United's maternity leave policy

"discriminates against females in general and Complainant in particular in that it singles out pregnancy for different treatment than any other physiological condition." (Pet.App. A5-A6).

In addition to medical and related testimony, the policy of the Federal Aviation Administration ("FAA") with respect to continued service of flight attendants during pregnancy was placed in evidence. The Division determined that the evidence showed that the FAA does not require air carriers to automatically place pregnant flight attendants on maternity leave, but, rather, suggests that the issue be handled on an individual basis. (Pet. App. A5).

The Division rejected United's sole defense, as unsupported by the evidence, that its maternity leave policy was a BFOQ (Pet.App.A5). Therefore, the Division ordered United to permit flight attendants to fly until their twentieth week of pregnancy provided that, if requested, the pregnant flight attendant would produce a semi-monthly confirmation from her own physician that her performance of flight attendant duties would not pose a health or safety hazard, and to permit flight attendants to fly from the twentieth to the twenty-eighth week of pregnancy unless United should find, as a result of a medical examination by United's physicians, that performance of flight attendant duties would pose such a hazard. The Division permitted United to disqualify flight attendants from flying without regard to their physical condition during and after the twenty-eighth week of pregnancy. The Division also ordered United to make Ms.

Rosenfeld whole for lost work and to provide accrued sick leave and disability benefits to female employees for pregnancy-related disabilities to the same extent provided to employees for other types of temporary physical disabilities. (Pet.App. A7-A8).

c. Proceedings in the New York Human Rights Appeals Board and the Courts of the State of New York.

United appealed the order of the Human Rights Division to the Human Rights Appeals Board, which heard oral argument and unanimously affirmed the order of the Division. (Pet. App. A21-A22).

Thereafter, United appealed to the Appellate Division for the Second Department of the New York Supreme Court. The Court consolidated the cases of Ms. Rosenfeld and Linda Mortimer and heard oral argument by all parties. The Appellate Division unanimously affirmed the Human Rights Division's findings and order. (Pet. App. A25-A28).

United then moved the Court of Appeals of the State of New York for leave to appeal. The Court of Appeals denied United's motion for leave to appeal on June 13, 1978. (Pet. App. A29).

ARGUMENT

The decisions below do not conflict with any applicable federal statute but comport with the determinations of federal courts and the Federal Aviation Administration. Nor are state employment discrimination laws pre-empted by federal regulation. Moreover, neither of the petitioner's claims in support of the petition was properly advanced or supported in the administrative agencies below. In all respects, this Court lacks jurisdiction under 28 U.S.C. §1257(3) and the petition should be denied.

1. The Order Below Does Not Conflict with Federal Law.

United does not challenge the Human Rights Division's finding that under New York State Law United's mandatory maternity leave policy is illegal and unjustifiable sex-based discrimination. Apparently United is also not seeking review of the Division's order with respect to the payment of sick leave and disability benefits. Therefore, these issues are not before the Court.

United asks that the writ be granted because after the Human Rights Division found that United's pregnancy leave policy violates the State Human Rights Law, a federal Court found that this policy does not violate Title VII of the Civil Rights Law of 1964, as amended, 42 U.S.C. §2000e et seq., Condit v. United Airlines, Inc., 13 FEP Cases 689 (E.D. Va. 1976), aff'd 558 F.2d 1176 (4th Cir. 1973), cert. denied ___U.S.___, 98 S.Ct. 1510(1978). There is no conflict between these

decisions, since Condit does not require United to maintain a mandatory pregnancy leave policy for flight attendants, but only found that such policy does not contravene Title VII standards. The Court of Appeals in Condit did not hold otherwise but affirmed solely on the basis that the findings of the trial court were not clearly erroneous. Both Titles VII and XI of the Civil Rights Law of 1964 recognize that fair employment law is the permissible domain of states and local governments. See 42 U.S.C. §2000e-7 and 42 U.S.C. §2000h-4.

The Condit decision does not determine that United's mandatory pregnancy leave policy is required by the Federal Aviation Act; observance of the Human Rights Division decision can not conflict with applicable federal safety legislation. Indeed, as found by the Division, the FAA does not require air carriers to automatically place pregnant flight attendants on maternity leave, but, rather, suggests that the issue be handled on an individual basis. (Pet. App. A5).

This determination by the Division accords with the decision of the U.S. District Court for the Eastern District of Virginia in Burwell v. Eastern Airlines, Inc. ___F.Supp.___, No. 74-0418-R (E.D. Va. September 6, 1978), appeal pending, which held that FAA regulations do not require a policy of mandatory maternity leave upon knowledge of pregnancy or even suggest that it is advisable.

Moreover, other air carriers governed by the FAA have not required mandatory leave upon knowledge of pregnancy for their flight attendants and received

no adverse reaction by the FAA. As noted in other decisions Northwest Airlines, Inc. does not impose such a policy. In re National Airlines, Inc., Maternity Leave Practices and Flight Attendant Weight Program Litigation, 434 F.Supp. 249, 259-260 (S.D. Fla. 1977). Ozark Airlines, Inc. recently entered into a Consent Decree eliminating this policy as well. A copy of the Consent Decree is in the Appendix hereto (A.1a-5a).

The federal courts have found other air carriers' mandatory maternity leave policies invalid under Title VII, both before and after Condit. Burwell v. Eastern Airlines, Inc., supra; MacLennan v. American Airlines, Inc., 440 F.Supp. 466 (E.D.Va. 1977) appeal pending; In re National Airlines, Inc., Maternity Leave Practices and Flight Attendant Weight Program Litigation, supra. The fact that in MacLennan and Burwell the judges reached findings opposite those in Condit after Condit was affirmed also illustrates that the findings of each tribunal are subject to review only according to the standards applicable to that proceeding. As the Court observed in Burwell, supra, a split in the courts on the issue of mandatory maternity leave under Title VII is not surprising since every case must be decided on the evidence presented in that particular case and the Court of Appeals did not even express agreement with the District Court's findings of fact in Condit.

2. The State Agency's Order Does Not Impose An Undue Burden on Commerce.

United contends that the implementation of the state agency's order would cause an undue burden on commerce "by intruding into an area in which uniformity of operation on a nationwide basis is essential." (Pet. 10). This argument is without merit.

There is absolutely no evidence of record to support United's claim of undue burden and none was ever offered by United. In effect, United is now asking the U.S. Supreme Court to make a factual determination with respect to possible burdens on commerce which United never asked the Human Rights Division to make.

The Human Rights Division decision regulates United's maternity leave policy only with respect to United's flight attendants based in New York. Flight attendant duties are unchanged by pregnancy. There is thus no reason why United cannot observe the laws of New York State as to its employees based in New York without confusion to its flight operations. Moreover, United's employees in New York are entitled to the same protection of that State's laws as are other employees in New York.

Under our constitutional scheme, the states retain broad power to legislate protection for their citizens. See DeCanas v. Bica, 424 U.S. 351 (1976); New York State Dept. of Social Services v. Dublino, 413 U.S. 405 (1973). Employment practices have traditionally been a subject of state legislation, as is evidenced by state work compensation laws and the like. Simpson v. Alaska State Commission for Human Rights, 423 F.Supp. 552

(D.Alaska 1976). Indeed, Title VII expressly recognizes state regulation of fair employment practices and disavows any intent to "occupy the field." See 42 U.S.C. §2000e-7, §2000h-4. Significantly, there is no provision in Title VII for exempting from state regulation employers, as United, engaged in providing transportation service across state lines. The Human Rights Division's order is merely an exercise of the power reserved to the states which, although it may touch upon the conduct of interstate commerce, does not burden interstate commerce. De Canas v. Bica, supra at 356-357.

Thus, United has no basis for raising a question of violation of the Commerce Clause of the U.S. Constitution since United has not shown that the Human Rights Division's order places an undue burden on commerce.

3. Neither the Claim Under the Supremacy Clause Nor the Claim Under the Commerce Clause Were Raised Before the Human Rights Division.

United never raised the claim before the state agency that an undue burden on interstate commerce would result from granting the relief sought by Ms. Rosenfeld. There was no evidence whatsoever in the record to support this claim. Similarly, United indicates that it first raised the claim of a potential conflict between state regulations and Title VII which would contravene the Supremacy Clause in the Human Rights Appeal Board. (Pet. 6-7).

The New York State Human Rights Law, Executive Law §298 provides that failure to assert a claim in prior proceedings precludes consideration of that claim by a court, absent extraordinary circumstances. United has neither raised its claims before the proper state agency nor shown extraordinary circumstances as required by the state statute. Under state law, United improperly asserted these matters on appeal to the state courts.

The U.S. Supreme Court does not consider claims brought on a petition for a writ of certiorari where those claims were not first raised in a trial court or similar fact-finding forum. Tacon v. Arizona, 410 U.S. 351 (1973). Thus, under federal law as well as state law, United's claims under the Supremacy Clause and Commerce Clause of the U.S. Constitution cannot now serve as a basis for granting United's petition.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	)	
Plaintiff,	)	No.
v.	)	74 C 1470
OZARK AIR LINES, INC.,	)	
Defendant.	)	

CONSENT DECREE

On May 29, 1974, plaintiff Air Line Pilots Association, International ("ALPA"), filed a complaint charging defendant Ozark Air Lines, Inc. ("Ozark"), with engaging in sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e ("Title VII") by reason of Ozark's weight standards policies and maternity leave of absence policies, including the alleged denial of employment opportunity upon pregnancy and the alleged denial of sick leave and other benefits. The Complaint sought injunctive and other relief on behalf of ALPA and female flight attendants who may have been or would be adversely affected by the acts and practices alleged.

Ozark denies engaging in any activities

violative of Title VII or any other equal employment law. The parties, however, wishing to fully and finally resolve all maternity-related issues raised by the complaint without the time and expense of further contested litigation, consent to the entry of this Decree.

It appears to the Court that the entry of this Decree will further the objectives of Title VII, and this Decree is being entered with the intent and purpose of fully and finally resolving all maternity-related issues and claims raised by the Complaint.

Now, therefore, it is hereby ORDERED, ADJUDGED, and DECREED, as follows:

I. General

1. This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim upon which relief may be granted against defendant under Title VII as to all issues resolved herein.

2. Neither the agreement to entry of this Decree nor anything in this Decree or accomplished thereby shall be construed to be, or shall be, admissible in any proceeding as evidence of an admission by defendant of any pattern or practice of resistance to the full enjoyment of rights under Title VII, or any violation of, failure to comply with, or interference, or obstruction of compliance with Title VII, as amended, or any other equal employment law, and Ozark expressly denies engaging in any activities violative of the law.

3. As to those issues between plaintiff and defendant relating to alleged acts and practices of discrimination by the defendant which are resolved by this Decree, and, with respect to such matters, compliance with this Decree shall be deemed to be compliance with Title VII.

II. Maternity and Weight Issues

1. A flight attendant shall, upon knowledge of her pregnancy, promptly notify the company. A flight attendant who intends to return to work at the conclusion of her pregnancy shall be granted a maternity leave of absence providing she applies for such leave before the end of the first trimester.

2. A pregnant flight attendant who meets all the qualifications for her job and whose doctor has certified she is fit for duty shall be allowed to continue working for a period not to exceed the 24th week of pregnancy, provided however, in the period from the end of the first trimester to the 24th week of pregnancy the company may require certification from a physician of its choosing before the flight attendant may perform her flight duties. Any dispute over the right of a flight attendant to continue flying under the provisions of this paragraph shall be subject to Section 19 of the collective bargaining agreement.

3. Flight attendants on maternity leave shall retain and accrue seniority during such leave. The flight attendants shall retain and continue to accrue longevity (for base pay or salary purposes) for the first six months of such leave,

but thereafter longevity shall not accrue.

4. Maternity leaves shall be granted for the duration of pregnancy and six months beyond termination of pregnancy. If a flight attendant needs extra time, she may request an extension within the six month period and if it is supported by medical justification from her physician, subject to verification by a physician selected by the company, it will be granted. A flight attendant on maternity leave shall be entitled to return to active employment after termination of her pregnancy within the period of her leave, upon giving the company thirty days notice in writing prior to returning and certification by her doctor that she is able to return to work, subject to meeting the normal company requirements for her job, passing a company physical exam, and completing any required training without pay. Any dispute over right to return to service will be handled in accordance with Section 19 of the collective bargaining agreement.

5. The seniority and longevity of currently employed female flight attendants who have previously taken maternity leave and not received seniority and longevity credit as provided by Section II Paragraph 3 of this Decree, shall be adjusted on a case by case basis after review of personnel files based upon the provisions of Section II, Paragraph 3 of this Decree. The parties shall meet within 90 days from entry of this Decree for the purpose of reviewing such matters and completing necessary adjustments. Such adjustments shall be effective only after the date on which the corrections are made. Company records shall thereafter

be corrected and a new seniority list published.

6. This Decree does not pertain to or affect the issues presented by the Complaint with respect to Ozark's weight policies for flight attendants.

7. The parties hereby agree that to the extent the Collective Bargaining Agreement may be inconsistent with Section II, Paragraphs 1 through 5 of this Decree, said agreement is hereby modified to conform to this Decree; provided, however, nothing in this Decree shall operate to change the collective bargaining rights of the parties nor prevent ALPA and Ozark from pursuing normal collective bargaining related to areas covered by this Decree so long as nothing done therein shall be inconsistent with this Decree.

ORDERED THIS 21st DAY OF MARCH 1978.

/s/George N. Leighton
George N. Leighton
United States District Judge

Agreed and Consented to by:

OZARK AIR LINES, INC.

By: /s/Jerry T. Redfern

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

By: /s/Stephen B. Moldof